

24377

STATE OF MICHIGAN
IN THE SUPREME COURT

BARBARA STANISZ,

Plaintiff-Appellee,

Supreme Court
Case No. 124377

Court of Appeals
Case No. 236371

v

FEDERAL EXPRESS CORPORATION,
a Delaware corporation, and
DENNIS MARKEY, an individual,

Saginaw County Circuit Court
Civil Action No. 99-29224-CZ-4
Hon William A. Crane

Defendants-Appellants.

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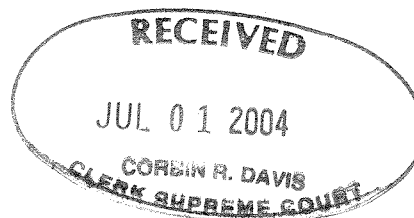
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PLAINTIFF'S SUPPLEMENTAL BRIEF
IN RESPONSE TO APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

Submitted by:

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I. INTRODUCTION

Defendants filed their Application for Leave to Appeal with this Court and Plaintiff has filed its response to the Application for Leave to Appeal. On June 3, 2004, this Court issued its Order pursuant to MCR 7.302(G)(1), directing the clerk to schedule oral argument on whether to grant the Application for Leave to Appeal or take other peremptory action permitted by MCR 7.302(G)(1). This Court's Order permitted the parties to file supplemental briefs within twenty-eight (28) days of the date of the Order.

Plaintiff submits that neither leave to appeal nor peremptory reversal are appropriate in this case. Plaintiff submits that there are two Michigan Court of Appeals cases directly on point, one of them an unpublished per curiam opinion from a panel that included Chief Justice Corrigan. In both of those cases, *Flores v Dalman*, 199 Mich App 396, 502 NW2d 725 (1993) and *Ropp v Wurtsmith Community Credit Union*, 1996 WL 333 64641 (Mich App, decided April 19, 1996) (Exhibit 3), the Court of Appeals found, despite reversal on one theory of liability, remand was not required where the Plaintiff had alleged several over-lapping theories of recovery and Plaintiff's damages remained the same regardless of which particular theory of recovery was successful.

Plaintiff's Complaint in this action arose out of the termination of her employment by Defendant Federal Express Corporation ("Federal Express"). The Complaint alleged three (3) causes of action arising under the Elliot-Larsen Civil Rights Act, MCLA §37.2101 *et seq*:

- (v) Sex discrimination in violation of MCLA §37.2202;
- (vi) Sexual harassment in violation of MCLA §37.2202 and MCLA §37.2103(i), and;
- (vii) Retaliation in violation of MCLA §37.2701(a).

Plaintiff sought damages for each of these violations of the Elliot-Larsen Civil Rights Act

under the damage provision of the Act, MCLA §37.2801(3). Plaintiff's Complaint sought the same damages for each violation of the Elliot-Larsen Civil Rights Act, namely, Plaintiff sought to recover damages for back pay and front pay as well as emotional distress damages in connection with her claims under the Act. Plaintiff also filed an assault claim against Defendant Dennis Markey in his individual capacity. That claim is not at issue in the pending Application for Leave to Appeal.

The case was tried to a jury in the Saginaw County Circuit Court. On March 9, 2001, the jury returned a verdict awarding Plaintiff One Million Nine Hundred Sixty-Three Thousand and no/100 (\$1,963,000.00) Dollars in damages. The verdict was returned on a special verdict form that was prepared jointly and agreed to by both Plaintiff and Defendants. A copy of the Special Verdict Form is attached as Exhibit 1. On the Special Verdict Form, the jury responded in relevant part as follows:

- (1) Did Defendant Federal Express Corporation discriminate against Plaintiff on the basis of her sex as defined in the jury instructions?

Yes X

No

- (2) Did Defendant Federal Express Corporation retaliate against the Plaintiff as defined in the jury instructions?

Yes X

No

- (3) Did Defendant Federal Express Corporation sexually harass Plaintiff as defined in the jury instructions?

Yes X

No

- (4) What are Plaintiff's damages?

Past Lost Wages, Bonuses and Fringe Benefits:	\$ 96,000.00
Future Lost Wages, Bonuses and Fringe Benefits:	\$ 342,000.00
Past Emotional Distress, Mental Anguish and Humiliation:	\$1,000,000.00

Future Emotional Distress, Mental Anguish and Humiliation:	\$ 500,000.00
TOTAL DAMAGES:	\$1,938,000.00

* * *

The Judgment in this case was entered on March 26, 2001 together with the Court's Order granting Plaintiff's reasonable attorneys' fees under the Elliot-Larsen Civil Rights Act. The Trial Court subsequently remitted the verdict to One Million Thirty-Eight Thousand and no/100 (\$1,038,000.00) Dollars.

Defendants filed their Claim of Appeal in the Michigan Court of Appeals on August 24, 2001. On July 15, 2003, the Michigan Court of Appeals issued an unpublished, *per curiam* opinion in which the Court affirmed the Judgment on Plaintiff's sex discrimination and retaliation claims, but reversed on the sexual harassment theory, based on the Supreme Court's decision in *Haynie v State of Michigan*, 468 Mich 302; 664 NW2d 129 (2003) which was decided shortly before the Court of Appeals argument. The Court of Appeals upheld the damage award, as remitted, despite the reversal on the sexual harassment claim after considering and rejecting the remand argument Plaintiff has made to this Court. A copy of the Court of Appeals' opinion is attached as Exhibit 2.

II. FACTS

Plaintiff incorporates the Counter-Statement of Facts contained in Plaintiff's Response to Application for Leave to Appeal. An examination of Plaintiff's three (3) alternate theories of liability under the Elliot-Larsen Civil Rights Act demonstrates that each of Plaintiff's claims arise from a common nucleus of operative facts.

A. Plaintiff's Claims for Sexual Harassment

Plaintiff's Complaint alleged a cause of action for sexual harassment under the Elliot-Larsen Civil Rights Act. Plaintiff's claim for sexual harassment was based on the fact that Dennis

Markey repeatedly subjected Plaintiff to a steady stream of derogatory comments about females, (Trial Transcript 2/28/01 at pp.179, 188-190), females as managers, (Trial Transcript 2/28/01 at p. 179), publicly announced that he would not follow instructions from a female manager, (Trial Transcript 2/28/02 at pp. 179-80, 188), and encouraged his co-workers not to follow the instructions of a female manager (Trial Transcript 2/28/01 at pp. 181-182). Markey refused to even meet with the Plaintiff or his direct supervisor, Kathy Parker, because they were females (Trial Transcript 3/8/01 at pp. 175-176). Likewise, Markey repeatedly challenged Plaintiff's management authority in public, including threatening her with physical harm when he chased her down the belt area and had to be separated from the Plaintiff by two other employees (Trial Transcript 3/1/01 at pp. 63-66, Trial Transcript 3/2/02 at pp. 26-27).

Plaintiff's Complaint alleged that Markey's blatant sexist comments, chauvinism, disrespect for female management, female employees, and his contempt for females in general, created an intimidating and hostile working environment for the Plaintiff and other females who worked at the station. Plaintiff alleged that this steady stream of anti-female comments, Plaintiff's reporting of the treatment to management, and management's failure to take any action, (Trial Transcript 3/1/01 at pp. 37-41, 66-68, 91-95), created a hostile environment and gave rise to Plaintiff's claim for sexual harassment. Plaintiff argued that Markey's gender-biased comments constituted communications of a "sexual nature" which supported the hostile work environment claim of sexual harassment under *Koester v City of Novi*, 458 Mich 1 (1998). This was especially true in light of Plaintiff having reported these conditions to management, and management's complete failure to take any steps to stop the behavior. *Pollard v DuPont De Nemours Co*, 213 F3d 933 (2000), *rev'd on other grounds*, 532 US 843, 121 S Ct 1946, 150 L Ed 2d, 62 (2001). *See also, Williams v General Motors Corp*, 187 F3d 553 (6th Cir 1999).

B. Plaintiff's Claims for Sexual Discrimination

Plaintiff presented direct evidence that the two key decision-makers in this case, Matthew Thornton and Patrick Passanante, both harbored discriminatory attitudes toward Plaintiff and female managers. As noted in the prior Counterstatement of Facts, Plaintiff regularly reported Dennis Markey's derogatory and discriminatory comments regarding females and female managers, and the hostile environment which it was creating, to Patrick Passanante, who was the Personnel Manager for the Region (Trial Transcript 3/1/01 at pp. 37-41, 66-68, 91-95). In response to Plaintiff's complaints about Markey's discriminatory conduct, Passanante sided with Markey and repeatedly told Plaintiff that she was "an over-bearing woman" and a "controlling female" (Trial Transcript 3/1/01 at pp. 37-41). When she reported Markey's assault on her in July of 1998, Passanante told her that she would have to put up with Dennis Markey and told her that he was not even going to come out and do an investigation of the incident (Trial Transcript 3/1/01 at pp. 66-68). Likewise, during the conference call that occurred on September 21, 1998, in response to Plaintiff's complaints to Matthew Thornton, the Vice President of the Company, Thornton told Plaintiff that both he and Passanante believed that Plaintiff was a "controlling woman" and that she was the problem (Trial Transcript 3/1/01 at pp. 91-95).

The critical comments by Passanante and Thornton directed to the Plaintiff, that she was nothing but an "overbearing woman" and "controlling female", and that she was just a "controlling woman" were clearly derogatory comments directed to Plaintiff and based on her sex. The comments specifically referenced Plaintiff's sex in a derogatory fashion, and showed that the decision-makers were utilizing her sex as a factor in their personnel decisions. Similarly, when considered in connection with management's continued and repeated toleration of Markey's discriminatory and derogatory comments about women as managers as well as his assault of the Plaintiff, certainly suggested a predisposition to discriminate by the decision-makers and supported

Plaintiff's claim for sex discrimination. *Dixon v W W Grainger, Inc*, 168, Mich App 107, 115 (1997).

Plaintiff also demonstrated a *prima facie* case of sex discrimination based on the disparate treatment theory. Plaintiff's direct supervisor, Mike Reed, admitted that Plaintiff was treated differently than other male station managers.

C. Retaliation Claim

The evidence in this case demonstrated that Plaintiff began complaining about the discriminatory comments and treatment, derogatory comments, the hostile working environment that was being created by Dennis Markey, and voiced her opposition to his discriminatory and harassing conduct to Patrick Passanante, especially during the period from March through September of 1998 (Trial Transcript 3/1/01 at pp. 37-41, 66-68, 91-95). Plaintiff complained to Passanante about the derogatory and discriminatory comments being made by Markey and being directed to her and the other female employees of the facility (Trial Transcript 3/1/01 at pp. 37-41). She also voiced her concerns about work-place violence relating to Markey and her concerns about the intimidating and hostile environment that he was creating. Likewise, during the conference call on September 21, 1998, Plaintiff complained directly to Matthew Thornton and Passanante regarding Markey's discriminatory comments and the hostile and intimidating environment that was being created for the females at the station (Trial Transcript 3/1/01 at pp. 91-95). Rather than listening to Plaintiff's objections and investigating Markey's discriminatory actions and the hostile environment, Thornton and Passanante immediately retaliated against the Plaintiff, blaming her for the problems at the station and casting her as one of those "controlling females" (Trial Transcript 3/1/01 at p. 92). Thornton also told her during the conference call that he did not want to see another piece of paper crossing his desk regarding Dennis Markey. (Trial Transcript 3/1/01 at p. 93).

These facts clearly demonstrated that Plaintiff voiced her opposition to Markey's discriminatory and harassing conduct, which is protected activity under the Elliot-Larsen Civil Rights Act. The record also establishes that within a week after this conference call, when Plaintiff voiced her opposition to violations of the Act, Plaintiff was suspended and an investigation of the Plaintiff was undertaken. Ultimately, this led to the termination of her employment.

III. ARGUMENT

A. Remand is Unnecessary and Inappropriate in this Case Because Plaintiff Alleged Several Overlapping Theories of Recovery Under the Elliott-Larsen Civil Rights Act. Since the Verdicts On Plaintiff's Sex Discrimination and Retaliation Claims Were Affirmed on Appeal, the Damage Award is Supported by the Evidence.

Defendants have argued that the Court of Appeals' reversal of the Trial court's denial of summary disposition on Plaintiff's claim for sexual harassment requires that the case be remanded to the Trial court for a retrial on the issue of damages. Defendant argues that such a remand and retrial are necessary because the special verdict form used at trial did not require the jury to apportion damages among Plaintiff's claims for sex discrimination, retaliation and sexual harassment under the Elliott-Larsen Civil Rights Act.

Defendants have provided, mainly through string citations, a number of cases which Defendants claim support their argument that the appellate courts occasionally remand cases for a redetermination of damages when the verdict form does not separate damages among the various theories of liability. A careful review of the cases cited by the Defendants and the rationale underlying those cases, demonstrates that they do not support the Defendants' argument in this case.

Many of the cases cited by Defendants involve the Plaintiff asserting multiple theories of liability and the case being submitted to the jury on a general verdict form. In those cases, where the Court of Appeals reverses the denial of a motion for summary disposition or a motion for

judgment notwithstanding the verdict on one of Plaintiff's claims, the Court of Appeals has concluded that remand is appropriate with respect to the remaining claims. In these cases, the courts have noted that the jury's general verdict could have been based on either or both of the alternative theories, one of which had been improperly submitted to the jury. As a result, the courts have remanded for new trial based on the fact that the court had no method to determine upon which theory the jury had based their damage verdict. See, *Miracle Boot Puller Company, Ltd v Plastray Corporation*, 84 Mich App 118, 269 NW2d 496 (1978) and *McGriff v Minnesota Mutual Life Insurance Co*, 127 F3d 1410 (11th Cir 1997).

Typical of these "general verdict" cases is *Rock v Derrick*, 51 Mich App 704, 216 NW2d 496 (1974). In that case, Plaintiff sued Defendant alleging claims for adverse possession and acquiescence. After the jury returned a general verdict in favor of Plaintiff, Defendant appealed the denial of its Motion for Judgment Notwithstanding the Verdict. The Court of Appeals reversed on the adverse possession claim but affirmed on the claim of acquiescence. In remanding the case, the Court found:

Since this was a general verdict and it is impossible to tell whether the jury verdict rested on the infirm ground of adverse possession and/or some application of the pervasive acquiescence doctrine, we necessarily must reverse and remand for a new trial . . . *Id.* At 709.

This case is clearly distinguishable from the "general verdict" cases relied upon by Defendant. As noted above, Plaintiff's claims arose from a common nucleus of operative facts. Plaintiff's Complaint alleged three overlapping claims against the Defendants under the Elliott-Larsen Civil Rights Act, MCLA §37.2101 *et seq.*; (i) sex discrimination in violation of MCLA §37.2202, (ii) sexual harassment in violation of MCLA §37.2202 and 37.2103(i) and (iii) retaliation in violation of MCLA §37.2701(a). Plaintiff sought damages for each of these violations of the Elliott-Larsen Civil Rights Act under the damage provision under the Act, MCLA §37.2801(3). Plaintiff sought to recover the same damages for each violation of the Act. Under

each of these claims, Plaintiff sought to recover her economic damages associated with the termination of her employment (back pay and front pay) as well as the non-economic damages for emotional distress and pain and suffering that she suffered. The same elements of damage were available under each of the claims under the Elliott-Larsen Civil Rights Act. Plaintiff alleged under each of the three theories, that her employment was terminated as a result of the violations of the Act. Plaintiff also alleged that she suffered emotional distress damages in connection with each of the three violations of the Act. These same elements of damages were available under each of the claims under the Elliott-Larsen Civil Rights Act and Plaintiff made no attempt to separate the damages suffered as a result of the separate violations of the Act through the testimony at trial or in closing argument. Because the same damages were available for each of the Defendant's violations of the Act, there was no need to attempt to distinguish or apportion damages among the various claims. Plaintiff sought to recover the same damages under the Act for each of the violations.

Unlike the "general verdict cases" relied upon by Defendants, the reversal of the Trial court's denial of Defendants' Motion for Summary Disposition on the sexual harassment claim does not require a remand. In this case, as a result of the special verdict form, this Court is not left to guess or speculate whether the jury verdict was based on the sexual harassment claim, which has now been reversed, or on the alternate claims alleged by Plaintiff. As a result of the special verdict form in this case, this Court knows that, in addition to the jury's finding of sexual harassment, the jury also made a specific finding that the Defendants discriminated against the Plaintiff based on her sex, in violation of the Elliott-Larsen Civil Rights Act. The Court also knows that the jury determined that the Defendants had retaliated against the Plaintiff in violation of the Act. Unlike the "general verdict cases" relied upon by Defendants, as a result of the special verdict form, this Court knows that the damage verdict itself was supported by both of these

claims asserted by Plaintiff regardless of the reversal on the sexual harassment claim. Likewise, both of the remaining claims resulted in the same damages being incurred by Plaintiff and the same damages were available under each of the three theories of liability. As a result of the special verdict form, and the jury's specific findings on each of the three theories of liability, remand is unnecessary and inappropriate as the damage verdict is supported by the Jury's specific findings of sex discrimination and retaliation in spite of the reversal on the sexual harassment claim. The jury's special verdict finding Defendants liable for sex discrimination and retaliation each fully support the damage award in this case and the reversal on the sexual harassment claim has no impact on the jury's findings on the other two claims. Simply put, a finding in favor of the Plaintiff on any one of her three theories of liability, standing alone, fully supported the entire damage award.

In its Opinion in this case, the Court of Appeals followed this reasoning and stated:

We note that as it relates to economic damages, even in the absence of waiver on the issue, remand on the issue of economic damages would not be required since the jury found in favor of all three theories of recovery, any one of which would support the award of economic damages in its entirety. Moreover, because the same conduct gave rise to the non-economic damages, regardless whether that conduct was labeled sex discrimination or sexual harassment, [or Retaliation] the entire damage award is supported despite our reversal of the sexual harassment claim. [Court of Appeals' Opinion, Exhibit 2, p. 13, fn2). (Emphasis added)

The Court of Appeals was clearly correct with respect to this issue. The present action is similar to that in *Flones v Dalman*, 199 Mich App 396, 502 NW2d 725 (1993). In that case, Plaintiff filed an action against a state police officer on theories of negligence, false arrest and imprisonment, malicious prosecution and loss of consortium. The trial court had denied Defendants' Motion for Summary Disposition based on the grounds of governmental immunity. The jury found in favor of the Plaintiff with respect to each theory and entered a general damage award of Three Hundred Seventy-Five Thousand and no/100 (\$375,000.00) Dollars for Plaintiff's injury.

On appeal, Defendant argued that the trial court had erred in failing to grant motions for summary disposition, motions for directed verdict and post-trial motions with respect to the issues of: (1) governmental immunity; (2) Plaintiff's claims for negligence; (3) Plaintiff's claims for false arrest, imprisonment and malicious prosecution. The Court of Appeals rejected the Defendant's governmental immunity argument finding a question of fact with respect to whether or not the Defendant had acted in good faith and also rejected Defendant's arguments with respect to Plaintiff's claims for false arrest, imprisonment and malicious prosecution. However, the Court of Appeal's reversed as to Plaintiff's claim for negligence holding that the negligence claim should have been dismissed and should not have been submitted to the jury for determination.

Defendant then argued that the reversal on the negligence issue required a reversal of the judgment and remand of the case for retrial on the issue of damages because the verdict form did not apportion the damages. The Court of Appeals rejected Defendant's argument, holding as follows:

The remaining question is whether reversal of the judgment is required because of our resolution of the negligence issue. We conclude that it is not. Plaintiff's alleged several overlapping theories of tort recovery. Plaintiff's damages, however, remain the same regardless of which particular theory of recovery is successful. The jury returned a separate verdict regarding each theory, but only a single lump-sum award of damages. Thus, even if plaintiff's negligence claim should not have gone to the jury, the damage award may be sustained because plaintiff's prevailed on their other claims. The result would be different had we been unable to discern the particular theory or theories upon which recovery was grounded. *Id.* At 405-406. (Emphasis added)

The present case is analogous to *Flones*. Plaintiff in this case alleged three overlapping theories of liability under the Elliott-Larsen Civil Rights Act arising from a common set of facts. As in *Flones*, Plaintiff's damages under the Elliott-Larsen Civil Rights Act were the same regardless of which particular theory of recovery was successful. Likewise, as in *Flones*, the jury returned a separate verdict regarding each theory of liability under the Elliott-Larsen Civil Rights Act, but only a single award of damages broken down into its separate components. Accordingly,

as in *Flores*, even if the Plaintiff's sexual harassment claim should not have gone to the jury, the damage award should be affirmed in this case because Plaintiff prevailed on her other two claims under the Elliott-Larsen Civil Rights Act and was entitled to the same damages under all three alternate theories. As in *Flores*, this court is able to determine the theories upon which Plaintiff's recovery was grounded as a result of the special verdict form and the damage award is supported under the Plaintiff's claims for sex discrimination and retaliation, regardless of the reversal on the sexual harassment claim.

The Court's rationale in *Flores* is similar to the unpublished opinion of the Court of Appeals in *Ropp v Wurtsmith Community Credit Union*, 1996 WL 333 64641 (Mich App, decided April 19, 1996) (Exhibit 3). In *Ropp*, a panel of the Court of Appeals, including Chief Justice Corrigan, considered a case in which Plaintiff alleged claims for discrimination and intentional infliction of emotional distress. At trial, a special verdict form was used for each Plaintiff which separated questions of liability based upon the theories of liability and separated damages between economic and non-economic damages, but, as in the instant case, did not apportion damages among the various theories of liability.

On appeal, Defendants sought reversal on the intentional infliction of emotional distress claim. Although the Court of Appeals found that the basis for liability on this theory was "questionable", the Court did not believe that reversal was warranted. On the special verdict form, the jury had found in favor of the Plaintiff on both the intentional infliction of emotional distress and the discrimination claims. In holding that any error in submitting the intentional infliction of emotional distress claim to the jury was harmless error, the Court of Appeals reasoned as follows:

. . . There is no indication in the record that either Kutzero or Morgan sought to recover damages for intentional infliction of emotional distress on the basis of conduct that was not also alleged to be discriminatory. Indeed, Defendant's approval of the verdict forms, and failure to request separate damage awards for

the two different theories of liability, reflect Defendant's acknowledgment that any award of emotional distress damages could be predicated upon a finding of liability for *either* discrimination *or* intentional infliction of emotional distress. Under these circumstances, and because the jury expressly found that Kutzera and Morgan both sustained emotional distress damages on account of discrimination, we find that any error in submitting the intentional infliction of emotional distress claims to the jury was harmless. *Id* at p. 5 (emphasis in original).

The same result is required in this case. As noted above, the same conduct which Plaintiff relied upon with respect to her claim of gender-based sexual harassment, also supported Plaintiff's claims for sex discrimination and retaliation. In addition, Defendant's liability under the remaining theories for sex discrimination and retaliation, both support the full damage award under the Elliott-Larsen Civil Rights Act, as the same damages were available under any one of the three theories of liability that were alleged by Plaintiff. Since the Court of Appeals has affirmed on the basis of Plaintiff's claims for sex discrimination and retaliation, both of these theories support the damage award in its entirety.

B. This Court Should Not Review Defendant's Argument Regarding The Defect In The Special Verdict Form, Where the Court of Appeals Properly Held That This Issue Was Waived In The Trial Court By Defendant's Express Approval Of The Special Verdict Form.

Defendant argues that it is entitled to a remand of this case back to the trial court for a re-trial on the issue of damages. Defendant argues that remand is necessary because the Special Verdict Form that was used at trial did not require the jury to separate or apportion damages under each theory of liability alleged by the Plaintiff.

In the Court of Appeals, Defendant argued for the first time that since Plaintiff's sexual harassment claim was reversed as a result of the Court of Appeals' reliance on *Haynie, supra*, a remand to the trial court was necessary for a "recalculation" of damages.

The Court of Appeals correctly rejected this argument and affirmed the damage award, finding first that Defendant had waived the issue on appeal by failing to object to the special verdict form at trial and by actually approving the special verdict form for use. The Court of Appeals went

on to explain that, pursuant to MCR 2.516(C) and MCR 2.514(A), Defendant waived any claim of error concerning the apportionment of damages. (Court of Appeals' Opinion at pp. 12-13).

MCR 2.514(C) is applicable and controlling in this case and provides:

If the Court omits from the special verdict form an issue of fact raised by the pleadings or the evidence, a party waives the right to a trial by jury of the issue omitted unless, before the jury retires, the party demands its submission to the jury.

...

Under the plain language of the rule, taken together with MCR 2.516(C), Defendant has waived any claim of error with respect to the failure of the special verdict form to apportion the amount of damages attributable to each of the alleged violations of the Elliott-Larsen Civil Rights Act.

Defendant's attempts to avoid the proper application of the well-settled law regarding waiver by arguing that it did not waive a "known right" because it had no way of knowing, at the time of trial, that Plaintiff's sexual harassment claim would eventually be reversed on appeal. Defendant's argument in this regard is baseless. Defendant had filed a Motion for Summary Disposition seeking to dismiss the sexual harassment claim, as well as a Motion for Directed Verdict, which was still under advisement by the trial court at the time the jury instructions and verdict form were given by the trial court. Defendant could certainly have requested an apportionment of damages in the special verdict form, or, in the alternative, could certainly have raised an objection to the lack of apportionment in the verdict form. Defendant made no such request or objection, because counsel for the Defendant was well aware that the same damages were recoverable by the Plaintiff under any of the three (3) alternate theories of liability under the Elliott-Larsen Civil Rights Act. Defense counsel made the deliberate choice not to require apportionment. As the Supreme Court has observed, it is "elementary" that "error to be reversible must be error of the trial judge; not error to which the aggrieved appellant contributed by planned or neglectful omission of action on his part." *Smith v Musgrove*, 372 Mich 329, 337; 125 NW2d 869 (1964).

Here, defense counsel agreed and stipulated to the use of the special verdict form which did not require the jury to apportion damages between Plaintiff's claims under the Elliott-Larsen Civil Rights Act. As a result, defense counsel certainly contributed to the alleged error upon which Defendant now seeks reversal. The Courts are unanimous in rejecting such claims of error. *See, Phinney v Verbrugge*, 222 Mich App 513, 537-538, 564 NW2d 532 (1997) where the Defendant argued that the judgment erroneously failed to distinguish between past and future damages. In rejecting Defendant's argument, the Court noted that counsel for the Defendant had stipulated to the use of a general verdict form and had waived any such claim of error. *See, also, Weiss v Hodge*, 223 Mich App, 620, 635-636, 567 NW2d 468 (1997) (a party who stipulated to a verdict form which did not comply with the tort reform requirements, waived appellate review of the issue.) *See, also, Dedes v Asch*, 233 Mich App 329, 590 NW2d 605 (1998) (waiver of error based on agreement and lack of objection to special verdict form.)

IV. CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, Plaintiff-Appellee Barbara Stanisz respectfully requests that this Court deny Defendant-Appellant's Application for Leave to Appeal.

Respectfully submitted,

DRIGGERS, SCHULTZ & HERBST, P.C.

By: 

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Dated: June 30, 2004

①

VERDICT FORM
USED AT TRIAL

SPECIAL VERDICT FORM

1. Did Defendant Federal Express Corporation discriminate against Plaintiff on the basis of her sex as defined in the jury instructions?

Yes ✓ No

2. Did Defendant Federal Express Corporation retaliate against the Plaintiff as defined in the jury instructions?

Yes ✓ No

3. Did Defendant Federal Express Corporation sexually harass Plaintiff as defined in the jury instructions?

Yes ✓ No

If your answer to any of the preceding questions is "Yes", go to Question No. 4. If your answer to each of the preceding questions is "No", go to Question No. 5.

4. What are Plaintiff's damages?

Past Lost Wages, Bonuses and Fringe Benefits: \$ 96,000

Future Lost Wages, Bonuses and Fringe Benefits: \$ 342,000

Past Emotional Distress, Mental Anguish and Humiliation: \$ 1,040,000

Future Emotional Distress, Mental Anguish and Humiliation: \$ 500,000

TOTAL DAMAGES \$ 1,238,000

Go to Question No. 5.

5. Did Defendant Dennis Markey assault the Plaintiff as defined in the jury instructions?

Yes ✓

No

If your answer is "Yes", go to Question No. 6. If Your answer is "No", sign the form where indicated.

6. What are Plaintiff's damages for assault? \$ 25,000

Date

Jury Foreperson

②

STATE OF MICHIGAN
COURT OF APPEALS

BARBARA STANISZ,

Plaintiff-Appellee/Cross-Appellant,

v

FEDERAL EXPRESS CORP,

Defendant-Appellant/Cross-
Appellee.

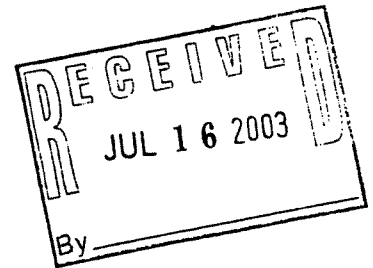
and

DENNIS MARKEY

Defendant-Appellant/Cross-
Appellee.

UNPUBLISHED
July 15, 2003

No. 236371
Saginaw Circuit Court
LC No. 99-029224-CZ



Before: Whitbeck, C.J., and White and Donofrio, JJ.

PER CURIAM.

Defendants, Federal Express Corporation and Dennis Markey, appeal as of right an opinion and order, and remittitur, following a jury verdict, in favor of plaintiff, Barbara Stanisiz in this sex discrimination, sex harassment, retaliation, and assault claim. Plaintiff appeals as of right the remittitur. We affirm in part and reverse in part.

I. Substantive Facts

Plaintiff began her employment with defendant corporation on April 8, 1990 as an operations manager for the Ann Arbor location managing and supervising couriers. Plaintiff consistently received above average performance reviews and received her first promotion in September 1993 when she became station manager of the Muskegon station. Plaintiff accepted a second promotion in September 1995 after she accepted an offer to become senior manager of the Midland, Bay City, Saginaw (MBS) location of defendant corporation.

When plaintiff started at the MBS location, Markey was a courier at the location. Plaintiff soon became aware that Markey had a problem with her abilities and her position in management. Markey was argumentative, did not follow direction, and made numerous

comments about her, and women in management in general. Some of Markey's comments according to plaintiff are as follows:

"[Plaintiff] had no business being the senior manager, [] they only put a woman in there to satisfy all the other crying women in the station and [] [plaintiff] didn't deserve the job and did not belong in it."

"[H]e didn't have to listen to me because I was a woman, and, again, I did not deserve the job; that he didn't have to listen to women anyway."

"[Y]ou don't have to listen to her. You don't have to take those stops. I'm not taking these stops. She told me I had to take them, all right? You don't have to listen to her. She's just a woman."

On one occasion Markey approached plaintiff to complain about a "performance reminder," a form of discipline, that he had received from his direct supervisor, for deviating from his delivery route and leaving his truck unattended that day. When plaintiff questioned Markey about the deviation, he stated that he had to seek medical attention. Plaintiff asked Markey if he had medical documentation for the visit to the doctor's office. Markey responded by telling plaintiff that he had a problem with his penis. He then said he was going to show her and then drew a picture of his penis with a vein on top of it, and explained that the vein was enlarged. Plaintiff responded stating that she was not a doctor, did not need to see the picture, and preferred that he just provide some sort of documentation for the visit. He then stated that plaintiff "wouldn't understand this anyway" because she did not have a penis, and that she could not understand how important his penis was to him. Markey never provided any medical documentation for the unscheduled stop.

Markey's attitude and comments got progressively worse in late 1997 through early 1998. Markey made more frequent comments to plaintiff that he did not have to do anything she told him to do since she was just a "helpless female," and that she did not know who was "really in charge." He also said that he was going to have her job, and that she was "just a stupid woman." During this time plaintiff also received complaints from other female employees at the station regarding Markey. Female couriers at Markey's level stated that Markey was loud, rude, and aggressive and as a result they felt intimidated by his behavior. He made comments to his female coworkers such as, "you're at my mercy, you have to take what I give you, I'm the one that's in control here."

Plaintiff contacted Patrick Passanante, the senior manager for personnel of the Michigan District and the Central Region of defendant corporation. Plaintiff described Markey's behavior, and also identified two female couriers who had also lodged complaints about Markey to plaintiff. Plaintiff relayed exchanges that she had had personally with Markey in an attempt to explain that Markey was rude, did not follow direction, and did not respect her at all. The initial discussion between plaintiff and Passanante lasted about two and a half hours. Following the original discussion, plaintiff contacted Passanante repeatedly explaining that she was familiar with defendants' employee handbook and believed Markey's behavior was inappropriate and created a hostile work environment for women in the workplace.

Passanante took no action and refused to cooperate with plaintiff despite her repeated communications with him about Markey's conduct. Passanante told plaintiff that she was an "overbearing woman" and eventually told her that she "had better be worried about [her] own conduct rather than [Markey's], that if there was anybody that was the problem it was [her]; that he didn't care to hear about [her] complaints. As far as he was concerned, [plaintiff] was the problem, and that he wasn't . . . even going to bother investigating them."

Around August 1997, plaintiff's manager changed and became Mike Reed. Plaintiff's first performance review under Reed occurred in September 1997, and her score was 3.0/4. During this time Markey continued to receive disciplines for his behavior from his supervisor, and he began filing GFT's¹ to challenge the disciplines. Reed and Passanante addressed Markey's complaints through the normal chain of command. In her role as senior manager plaintiff did not issue disciplines to Markey or handle the GFT's that he filed, but she did attempt to have conversations with Markey pursuant to an unwritten program of defendant corporation called "frank and open discussions," but he would not come into her office. Markey told plaintiff that he would not talk with plaintiff and would not sign anything unless Passanante reviewed it first.

In the beginning of 1998, Matthew Thornton became defendant corporation's regional vice president, who was one level above Reed. Plaintiff had a leadership evaluation in April 1998, and scored a seventy-three on the leadership index, an above-average score. Plaintiff also received a 4.0/4.0 on her leadership average score which Reed characterized as definitely a favorable score. Plaintiff received a commendation from Reed in April 1998 for the performance of the MBS station. In connection with the commendation, plaintiff received a performance-based payment. Plaintiff received another commendation from Reed due to results in several critical areas of the station together with a second performance-based payment in May 1998. In the commendation letter, Reed thanked plaintiff for her leadership, dedication, and contribution to the success of the Michigan district. Plaintiff was also recognized in May 1998 by Dave Rebholtz, the senior vice-president of defendant corporation, when he publicly commended plaintiff for her dedication to public service and leadership at the annual meeting for the central region managers. Plaintiff again received another bonus check for her performance.

In July 1998, plaintiff was in the warehouse when she was near Markey's workstation. Plaintiff attempted to give Markey guidance and he refused to listen to her, got very upset, and started hollering at plaintiff. Plaintiff turned around and started walking away from Markey. As she walked away, plaintiff looked back because Markey's yelling was getting louder, and she saw Markey running after her with his fist in the air still yelling. Plaintiff was afraid because she thought he was going to knock her over or strike her. Two men stepped next to her and Markey stopped approaching but kept hollering at plaintiff. Plaintiff told Markey to get in his truck and drive and then left the warehouse and went to her office where she felt safe.

Plaintiff called her immediate personnel representative, Dan O'Brien, who reported to Passanante, and told him what happened with Markey. Plaintiff also told him that she thought

¹ "GFT" stands for "guaranteed fair treatment" and is the first step in filing a grievance procedure at defendant corporation to begin the grievance process.

things were getting out of control and that she dealt with the situation for a year and now no longer felt safe. O'Brien said there was nothing he could do and that she had to call Passanante. Plaintiff called Passanante and again explained the situation. Passanante told plaintiff that she just had to put up with it and he would not come out and investigate. Plaintiff believed that Passanante felt she was at fault. After plaintiff reported the incident, Markey's comments and behavior did not change.

In September 1998, a conference call took place with plaintiff, Passanante, Thornton, and Reed to discuss issues surrounding the timing of Markey's performance review as well as issues raised by Markey in the GFT process. Thornton began the call by outlining Markey's issues. Plaintiff began to explain her point of view when Thornton cut her off. In a loud voice, Thornton stated that he and Passanante believed she was "a controlling woman," and that she "was the problem and he didn't want to hear any of [her] explanations." Thornton and Passanante would not allow plaintiff to explain anything. At one point during the call, plaintiff requested that her personnel representative, O'Brien, be allowed to participate in the conference call. Thornton denied plaintiff's request.

Plaintiff was very upset after the call and did not report to work the following day. However, she sent an email from her home to Reed relaying her feelings and stating that she believed there was some "legal exposure" since she had attempted to report what she believed to be a hostile work environment. A few days later plaintiff attended a meeting with Reed in Farmington Hills. The meeting consisted of a discussion about the conference call as well as plaintiff's annual performance review where she scored a 3.2/4.

The following day when plaintiff returned to her office she received a letter from a female courier. The letter raised several concerns surrounding Markey and his "defiant and challenging" conduct and criticized those above plaintiff in management for tolerating his instigating and antagonistic behavior. Reed came to Saginaw to meet with plaintiff the following day and asked plaintiff if she helped the female courier write the letter or was in any way involved with writing the letter. Plaintiff denied any involvement and stated that she had not even been in the office most of the previous week.

Reed informed plaintiff that Thornton believed otherwise and that he had to suspend plaintiff. Reed gave plaintiff a letter explaining that she was on investigative suspension to determine if she violated acceptable conduct policy or demonstrated leadership failure. Reed believed Thornton's directive to suspend plaintiff was "political in nature" because she continued to complain about Markey.

Plaintiff was never allowed to go back into the station after that day. Plaintiff cooperated with the investigation and met with Eric Plunkett, who had been assigned to investigate plaintiff, twice at a restaurant. Plunkett questioned her about her alleged involvement in the female courier's letter, conditions at the station principally involving Markey, and also about Passanante and plaintiff's beliefs that he had not supported her efforts to discipline Markey and that he let the station become out of control.

While still suspended, in October 1998 plaintiff filed an internal GFT EEO complaint stating that she believed she had been discriminated against. Shortly thereafter, plaintiff received a letter from defendant corporation stating that it was her right to utilize the internal EEO

process, the corporation would do a full investigation of her allegations, and that she would be protected from retaliation. Mary Norris contacted plaintiff and stated that she had been assigned to investigate her complaint, and requested plaintiff meet her for a meeting, but never got back with her and they never met.

Sometime after the suspension Reed forwarded an email to plaintiff that had originated about two weeks before plaintiff was suspended. The content of the email was Reed's response to an inquiry from Thornton asking Reed to identify senior managers in Michigan that he believed had high potential to move up to a managing director position. Reed had responded to Thornton's request with three names out of about twenty to twenty-five potential candidates, and one of the people was plaintiff.

In the beginning of November 1998 Reed informed plaintiff the investigation was complete and she was being demoted because a leadership failure had been identified. Plaintiff had two options, either accept a six-month severance package, or be demoted to an operations manager position in the Farmington Hills office. Plaintiff inquired about moving expenses since she lived in Saginaw approximately one hundred miles from the Farmington Hills office. Reed stated that since it would be a demotion defendant would not pay any moving expenses and that she would also receive a cut in pay. Plaintiff wrote a letter to Reed indicating that neither of the options were acceptable because she believed she was the person who had been threatened and intimidated in the workplace.

Plaintiff sent a letter to Ted Wisey, defendant corporation's CEO at the time as well as Rebholtz, the senior vice-president of defendant corporation informing them about her complaint and inquiring about the status of the investigation she requested. Plaintiff received a response letter from Rebholtz stating that the investigation was complete and that she had two options to consider, and that he would not be involved in her EEO complaint.

In late November 1998 plaintiff received a letter stating that she officially demoted to the Farmington Hills office and she was to report there for work two days later. Plaintiff contacted Reed's office requesting two more days off in order to make arrangements for her two teenage daughters due to the length of the drive to Farmington Hills, and to handle doctors' appointments. Plaintiff was being treated for issues related to stress stemming from the work related issues by her personal physician and a counselor.

Plaintiff was told that she could take two days off, but that she now had to report to the Romulus station rather than the Farmington Hills station. Plaintiff faxed a letter to Reed informing him that she would not be reporting to the Romulus office since it was approximately 137 miles, meaning over a two and a half hour drive, one-way, from her home. In response, plaintiff received a letter from Reed stating that she was terminated.

Plaintiff received a letter in late December 1998 regarding her internal EEO claim stating that the evidence did not substantiate her allegations of discrimination. Plaintiff was never interviewed or questioned by anyone about her claim before or after receiving this letter.

Plaintiff began to seek employment after she was terminated by defendant by sending out résumés and letters. She used the paper, contacted management recruiters, executive recruiters, and performed internet searches. By August 1999 plaintiff still had not obtained employment

and she believed that she could no longer afford her house in Saginaw and could not afford to support her children and guarantee stability in their lives. After spending the summer with him, plaintiff's children went to live with their father in Massachusetts. Plaintiff felt her life was a wreck at that point, she had lost her career, and the situation was forcing her to give up her children. Plaintiff felt great emotional pain. Plaintiff then called her mother, aged 71 at the time, and asked her if she could move in with her at her home in Garden City.

Plaintiff eventually found employment with Northwest Airlines, and began her new job in January 3, 2000 making \$48,000 per year. Plaintiff's regular salary for eleven months of 1998 was \$47,001 and her bonuses during the same time period totaled \$14,147, making her total compensation for eleven months of 1998 at defendant was \$61,148.

Plaintiff filed her complaint in this action alleging sex discrimination and harassment based on sex, retaliation, and assault. After surviving defendants' motion for summary disposition the case proceeded to trial before a jury. The jury found in favor of plaintiff on all counts and awarded her \$96,000 in past lost wages, \$342,000 in future lost wages, \$1,000,000 in past mental anguish damages, \$500,000 in future mental anguish damages, and finally, \$25,000 in damages for assault. The total award was \$1,963,000. The trial court awarded reasonable attorney's fees to plaintiff in the amount of \$83,238.75 and costs pursuant to the ELCRA in the amount of \$8,100. The trial court also denied defendants' motion for JNOV, or for new trial, but partially granted defendants' motion for remittitur, and reduced the jury award for past and future noneconomic damages from \$1,500,000 to \$600,000. Plaintiff accepted the remittitur. This appeal and cross-appeal followed.

II. Motion for Summary Disposition

This Court reviews de novo a trial court's grant of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "When reviewing a motion for summary disposition brought under MCR 2.116(C)(10), the trial court must consider the affidavits, pleadings, depositions, admissions, and documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Meyer v Center Line*, 242 Mich App 560, 574; 619 NW2d 182 (2000). Summary disposition is appropriate where the proffered evidence fails to establish a genuine issue of material fact. *Maiden, supra*; *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456, n 2; 597 NW2d 28 (1999).

Plaintiff alleges sex discrimination in violation of Michigan's Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq.* On appeal, defendant argues that plaintiff failed to establish her claim for sex discrimination because plaintiff did not prove disparate treatment by direct or indirect evidence. Further, defendant argues that plaintiff did not establish a prima facie case of sex discrimination to survive summary disposition because she did not demonstrate that she was treated differently from comparably situated persons who were not members of the protected class.

In its order denying summary disposition, the trial court did not make a finding regarding disparate treatment established by direct evidence. Disparate treatment claims may be established under ordinary principles of proof by the use of direct or indirect evidence. *Wilcoxon*

v Minnesota Mining & Mfg Co, 235 Mich App 347, 359; 597 NW2d 250 (1999). “Direct evidence” is evidence that, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer’s actions. *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001); *Harrison v Olde Financial Corp*, 225 Mich App 601, 610; 572 NW2d 679 (1997).

If, however, no direct evidence of discrimination can be produced, in order to avoid summary disposition the plaintiff must then proceed according to the prima facie test espoused in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), which has been adopted in modified form and reaffirmed by the Michigan Supreme Court in *Town v Michigan Bell Telephone Co*, 455 Mich 688, 689; 568 NW2d 64 (1997) and *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-178; 579 NW2d 906 (1998). See *Hazle, supra* at 462; *Wilcoxon, supra* at 359. “Direct evidence and the *McDonnell Douglas* formulation are simply different evidentiary paths by which to resolve the ultimate issue of [the] defendant’s discriminatory intent.” *Harrison, supra* at 610, quoting *Blalock v Metal Trades, Inc*, 775 F2d 703, 707 (CA 6, 1985). Direct evidence of discrimination removes the case from *McDonnell Douglas* because the plaintiff no longer requires the inference of discrimination provided by the “presumptive” prima facie case. *Id.*

Here, plaintiff argues that she presented direct evidence of disparate treatment based on her own affidavit and deposition testimony from Reed, the managing director of the Michigan District. Plaintiff stated in her affidavit that Passanante, the personnel manager in charge of the region and Thornton, a vice-president, made repeated comments to her that she was a “controlling female,” and that she was just an “aggressive female,” and that she was the problem and not Markey. Plaintiff stated that Thornton told her that he and Passanante believed that she “was one of those over aggressive females,” accused her of “persecuting” Markey, and “threatened” her stating that she “better change [her] ways” and told her that he “did not ever want to see another piece of paper regarding Dennis Markey cross his desk.” They refused to take any action, or even investigate Markey’s conduct despite plaintiff’s constant complaints about his hostile behavior.

Plaintiff also presented corroborating deposition testimony from Reed stating that Markey’s conduct was aggressive and “nasty” toward women in general and women in management especially plaintiff, and that Markey blatantly used words to describe plaintiff such as “bitch.” Reed further stated that despite being aware of Markey’s conduct, Thornton and Passanante refused to take action and instead were aggressive with plaintiff and “wanted her out.”

We find that plaintiff has presented direct evidence of sex discrimination in this case. In *Harrison, supra*, this Court stated that where the plaintiff had testified in a deposition that the defendants’ employees had made derogatory remarks about her race, this constituted direct evidence of discrimination. *Harrison, supra*, 225 Mich App 610. In this case, defendants claim that plaintiff was discharged because of a leadership failure. Because there is also direct evidence of sex discrimination in this case, plaintiff has met the initial burden of proving that the illegal conduct was more likely than not a substantial or motivating factor in defendants’ adverse employment decision regarding plaintiff. *Id.* Since plaintiff has established sex discrimination based on a clear showing of direct evidence, she need not establish a prima facie case of sex

discrimination. *Harrison, supra* at 610 The trial court did not err when it denied defendants' motion for summary disposition on the issue of sex discrimination.

Defendants also argue that plaintiff failed to establish a case of hostile work environment sex harassment to survive summary disposition. ELCRA prohibits an employer from discriminating because of sex, which includes sexual harassment. MCR 37.2202(1); MCL 37.2103(i); *Jager v Nationwide Truck Brokers, Inc.*, 252 Mich App 464, 471-473; 652 NW2d 503 (2002). In this case, plaintiff's sexual harassment claim against defendant is based on a hostile work environment. MCL 37.2103(i)(iii) provides:

(i) Discrimination because of sex includes sexual harassment. Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:

* * *

(iii) The conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile, or offensive employment . . . environment.

In order to demonstrate a claim of hostile environment harassment, an employee must prove the following elements by a preponderance of the evidence:

- (1) the employee belonged to a protected group;
- (2) the employee was subjected to communication or conduct on the basis of sex;
- (3) the employee was subjected to unwelcome sexual conduct or communication;
- (4) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and
- (5) respondeat superior. [*Chambers v Tretco, Inc.*, 463 Mich 297, 311; 614 NW2d 910 (2000), quoting *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993); *Jager, supra*, 252 Mich App 472-473.]

Our Supreme Court recently interpreted MCL 37.2103(i) in *Haynie v State of Michigan*, ___ Mich ___, ___ NW2d ___ (#120426, rel'd 6/11/03) slip op p 2, 8, 12-14. Our Supreme Court stated that the third element of a hostile work environment claim is derived from MCL 37.2103(i). *Id.* at 8. The Court held that:

The CRA prohibits sexual harassment, which is defined in that act as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature" MCL 37.2103(i). Accordingly, conduct or communication that is gender-based, but is not sexual in nature, does not constitute sexual harassment as that term is clearly defined in the CRA. *Id.* at 2.

The Court elaborated, stating:

The proper recourse for conduct or communication that is gender-based, but not sexual in nature, is a sex-discrimination claim, not a sexual harassment claim. *Id.* at 2 fn 2.

Here, plaintiff provided her own affidavit stating that throughout her entire tenure as senior manager at defendant, Markey was problem for her and other female employees at the station. Plaintiff stated that Markey made comments stating that she was only put in her job because she was a woman and that she needed to "shut up all the other crying women in the station." Plaintiff stated that Markey's behavior became more abusive and more derogatory during the last six months of her employment, March 1998 through September 1998. Markey told plaintiff that he would not listen to her because she was a woman at least twelve times, he stated that he would never listen to a woman, routinely referred to plaintiff as "bitch" and to Parker as, "that other bitch," and shouted at plaintiff using profanity in the presence of other employees. Markey also physically intimidated plaintiff.

Reed's deposition testimony supported plaintiff's assertions. Reed stated that Markey referred to plaintiff as "bitch," made chauvinistic remarks, used very foul and rude language, and was very aggressive, confrontational, and nasty. Reed stated Markey thought plaintiff "was on a power trip because she's a woman. He felt it was more difficult working for a female." Reed did not receive complaints from any of the other hourly employees aside from Markey.

After reviewing the record, although we find the treatment suffered by plaintiff to be deplorable, the conduct or communication at issue was gender-based but was not sexual in nature. *Haynie, supra*, at 2. Hence, in applying *Haynie*, we must reverse the trial court's denial of summary disposition on the issue of sexual harassment.

Defendants next argue that plaintiff failed to establish a case of retaliation. MCL 37.2701(a) states that a person shall not "[r]etaliat[e] or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act."

Defendants have mischaracterized the facts of the case when they argue that plaintiff's retaliation claim was based solely on the internal EEO complaint she filed on October 15, 1998. Plaintiff complained about discriminatory treatment, derogatory comments, workplace violence, and the hostile work environment created by Markey between the period of March 1998 through September 1998. Plaintiff also complained to personnel about Markey's derogatory comments and the hostile environment he created on several occasions, and notably, plaintiff complained directly to both Thornton and Passanante during the conference call. Plaintiff presented evidence that Thornton "threatened" her stating that she "better change [her] ways" and told her that he "did not ever want to see another piece of paper regarding Dennis Markey cross his desk" during the same conference call. Plaintiff was suspended, and an investigation started, just over a week after the conference call where she attempted to voice her concerns directly to Passanante and Thornton. We find that plaintiff has presented evidence sufficient to establish a genuine issue of material fact with respect to her retaliation claim.

III. Motion for JNOV

We review a trial court's decision on a motion for JNOV is novo. *Morinelli v Provident Life & Accident Co*, 242 Mich App 255, 260; 617 NW2d 777 (2000); see also *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998), and *Chiles v Machine Shop, Inc*, 238 Mich App 462, 469; 606 NW2d 398 (1999), but see *Anton v State Farm Mutual Ins Co*, 238 Mich App 673, 683; 607 NW2d 123 (1999). In reviewing the decision, this Court must view the testimony and all legitimate inferences from it in the light most favorable to the nonmoving party. *Forge, supra*; *Kallabat v State Farm Mutual Automobile Ins Co*, ___ Mich App ___, ___ NW2d ___ (#230627, rel'd 4/3/03) slip op p 2.

If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand. *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998). Only if the evidence fails to establish a claim as a matter of law will a JNOV be appropriate. *Forge, supra*; *Chiles, supra*. Moreover, a JNOV should be granted only when there was insufficient evidence presented to create an issue for the jury. *Craig v Oakwood Hospital*, 249 Mich App 534, 547; 643 NW2d 580 (2002) (Cooper, J, concurring).

In its opinion and order denying defendants' motion for JNOV, the trial court stated as follows:

Defendants raise a number of liability issues, the most central being the sufficiency of the evidence to support the verdict. Liability in this case was premised upon three theories. One, that plaintiff was suspended, demoted, terminated, or constructively discharged, and that sex was one of the motives or reasons which made a difference in that decision. Second, that she was the subject of sexual harassment that substantially interfered with her employment or that had the purpose or effect of creating an intimidating, hostile, or offensive employment environment. Third, that Federal Express retaliated against her because she voiced her opposition to what she reasonably perceived to be discriminatory acts and/or sexual harassment. The jury found for the plaintiff on all three theories. The Court finds no sound basis to overturn that decision. There is no need to repeat here the trial testimony supporting the jury determination. Suffice it to say, more than ample evidence was presented to support the jury finding of liability against Federal Express on all three theories as well as liability against defendant Markey for the assault.

Defendants argue that the trial court erred when it denied defendants' motion for JNOV where at trial plaintiff did not make the factual showing necessary to establish her claims. In reviewing the evidence in the light most favorable to plaintiff, our review of the record reveals that plaintiff only enlarged the record at trial. Further, defendants admit in their brief on appeal that, "[a]t trial, [p]laintiff's testimony regarding her employment with FedEx was consistent with her deposition testimony."

After considering the trial testimony, it is clear that plaintiff presented direct evidence of sex discrimination at trial. Reed stated that plaintiff was not treated in the same manner as other male senior managers in his district. Plaintiff presented evidence of management's, namely Passanante's and Thornton's awareness of and tolerance for Markey's blatantly derogatory

conduct and behavior, while at the same time presented evidence of their disdain for her, without any investigation of Markey's conduct. Vitally, Thornton specifically told plaintiff that he and Passanante believed she was a "controlling woman" in the conference call. Moreover, she presented evidence that without investigation, Thornton and Passanante wanted her out and directed Reed to take adverse employment action against plaintiff. Defendants claim that plaintiff was discharged because of a leadership failure. However, plaintiff presented ample direct evidence of sex discrimination. Plaintiff established that sex discrimination was more likely than not a substantial or motivating factor in defendants' employment decisions and showed a nexus between Thornton's comment about her sex during the conference call and his decision to have her placed on investigative suspension after the conference call about Markey and receiving Fox's letter about Markey.

Viewing the testimony and all legitimate inferences from it in the light most favorable to the nonmoving party, clearly reasonable jurors could have honestly reached different conclusions on the issue of sex discrimination, thus the jury verdict must stand. *Forge, supra*; *Kallabat, supra*, ___ Mich App ___; *Central Cartage Co, supra*, 232 Mich App 524. Therefore, the trial court did not err when it denied defendants' motion for JNOV on the issue of sex discrimination.

Defendants argue the trial court erred when it denied defendants' motion for a JNOV on the issue of sexual harassment. At trial, plaintiff presented testimony that Markey regularly referred to plaintiff as a "bitch" and made "references toward her gender." He constantly berated plaintiff and complained about her to Reed. Markey was aggressive when dealing with his female coworkers including plaintiff and was especially hostile toward her. Markey stated that he would not listen to plaintiff or follow direction from her because she was a woman. Upon plaintiff's questioning Markey about his whereabouts after Markey had deviated from his delivery route, Markey drew a picture of his penis and showed it to her explaining that he had an enlarged vein and sought medical attention for it, and further stated that she would never understand how important a penis is to a man. Markey also made comments such as the following about women and women in management, "when women are on their period . . . they're emotional, they're not rational, they overact."

After reviewing the record we do not find the conduct or communication at issue sexual in nature, but rather gender-based. *Haynie, supra*, at 2. Although Markey drew a picture of a penis and presented it to plaintiff, there was never any characterization that this action was intended as a "sexual advance," or any type of sexual communication, but rather as another of Markey's attempts to shock and demean plaintiff as a woman. Hence, in applying *Haynie*, we must reverse the trial court's denial of JNOV on the issue of sexual harassment.

Defendants next argue that plaintiff failed to establish a case of retaliation at trial. We find that plaintiff established at trial that she complained verbally about discriminatory treatment, derogatory comments, workplace violence, and the hostile work environment created by Markey between the period of March 1998 through September 1998, to personnel, and directly to Passanante, and later Thornton. Plaintiff established that she complained to both Thornton and Passanante during the conference call. Thornton stated that he and Passanante believed she was "a controlling woman," and that she "was the problem and he didn't want to hear any of [her] explanations." Thornton in effect threatened her stating that, "you're the problem and you need to change your ways." Thornton would not investigate the Markey situation, and instead commanded him to "aggressively take action against [plaintiff]."

The record establishes that plaintiff was suspended, and an investigation started just over a week after the conference call where she attempted to voice her concerns directly to Passanante and Thornton. Defendants also argue that plaintiff only complained to Passanante and never established that Passanante was a decision-maker. This argument fails for two reasons. First, because the record clearly establishes that plaintiff complained to both Passanante and Thornton. Second, a decision-maker in the context of "actual notice of harassment" is defined as "someone in the employer's chain of command who possesses the ability to exercise significant influence in the decision-making process of hiring, firing, and disciplining the offensive employee." *Sheridan v Forest Hills Public Schools*, 247 Mich App 611, 622; 637 NW2d 536 (2001). Plaintiff established at trial that Passanante was the senior manager for personnel of the Michigan district and the central region of which both plaintiff and Markey were employed. Clearly in his role as head of personnel, two levels above plaintiff and four levels above Markey, Passanante "possess[ed] the ability to exercise significant influence in the decision-making process of hiring, firing, and disciplining" Markey. *Sheridan, supra*, 247 Mich App 622. We find that plaintiff has presented evidence sufficient proving that she established a genuine issue of material fact with respect to her retaliation claim at trial.

Defendants also argue that plaintiff failed to establish a case of assault because she did not prove the elements of assault. "An assault is any intentional, unlawful threat or offer to do bodily injury to another by force, under circumstances which create a well-founded fear of imminent peril, coupled with the apparent present ability to carry out the act if not prevented." SJL2d 115.01, citing *Tinkler v Richter*, 295 Mich 396; 295 NW 201 (1940). The testimony at trial established that defendant Markey approached the plaintiff in a menacing way by running after her while hollering at her and shaking his fist. Plaintiff was scared for her safety and it took two men inserting themselves into the situation to stop Markey's advances toward plaintiff, even at this point, Markey continued yelling. We find that there was ample testimony to support the jury's determination that Markey assaulted plaintiff.

IV. Damages and Motion for Remittitur

Initially, because of our reversal of plaintiff's sexual harassment claim in light of *Haynie, supra*, we must first address the issue of damages. Plaintiff proceeded on three distinct theories of liability against defendant Federal Express: (1) sex discrimination, (2) sex harassment, and (3) retaliation. Our review of the record indicates that the manner in which the case was submitted to the jury makes it impossible to separate the bases of liability with respect to damages. Defense counsel did not object to the special verdict form that required findings on all three theories but did not separate out damage determinations per claim, or request a verdict form that required separate damage determinations per claim. In fact, after closing arguments, prior to instructing the jury, the trial court asked counsel for both parties if they had any comments regarding the jury instructions which included the special verdict form. Defense counsel made one comment regarding one of the instructions but did not object or make any comments about the special verdict form. Furthermore, when the trial court completed instructing the jury, upon questioning from the court, defense counsel explicitly stated that he had no objections to the jury instructions including the special verdict form.

MCR 2.516(C) provides that a "party may assign as error the giving of or failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict." MCR 2.514(A) states that if a special verdict form is required, the trial court shall settle

the form of the verdict in advance of argument and in the absence of the jury. As such, we find that defendants have waived any claim of error concerning the apportionment of damages.

Our Supreme Court distinguished waiver and forfeiture, stating, “[w]aiver has been defined as the intentional relinquishment or abandonment of a known right. It differs from forfeiture, which has been explained as the failure to make the timely assertion of a right.” *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001) (internal citations omitted). The Court went on to explain the different effects of waiver versus forfeiture. “One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error. Mere forfeiture, on the other hand, does not extinguish the error.” *Id.* Therefore because defendant specifically stated it had no objection to the jury instructions and special verdict form, we find that it has waived review of any issue regarding the apportionment of damages claim. Because waiver has extinguished any error, we affirm both the economic and noneconomic damages² award in total despite our reversal of one of the three theories of recovery.

Moving on to our discussion of the remittitur, in order to preserve the argument that a verdict was excessive, a party must move for remittitur or new trial, or object to the jury instruction on damages. *Peña v Ingham County Road Comm*, 255 Mich App 299, 315; 660 NW2d 351 (2003). This issue is only partially preserved for appeal because although defendants moved for remittitur in the lower court, defendants did not raise the issue of plaintiff’s non-entitlement to lost insurance benefits before the trial court.

A trial court’s decision regarding remittitur is reviewed on appeal for an abuse of discretion. *Palenkas v Beaumont Hospital*, 432 Mich 527, 533; 443 NW2d 354 (1989); *Craig, supra*, 249 Mich App 566-567; and see MCL 600.6098(4). The trial court, having witnessed the testimony and the evidence as well as the jury’s reactions, is in the best position to evaluate the credibility of the witnesses and make an informed decision, and thus due deference should be given to the trial court’s decision. *Palenkas, supra* at 534; *Phillips v Deihm*, 213 Mich App 389, 404; 541 NW2d 566 (1995). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court made its decision, would conclude that there was no justification for the ruling made. *Szymanski v Brown*, 221 Mich App 423, 431; 562 NW2d 212 (1997). This Court must consider the evidence in the light most favorable to the plaintiff when reviewing the trial court’s exercise of discretion regarding remittitur. *Deihm, supra*, 213 Mich App 405.

A trial court may grant a new trial when the damage award is excessive. MCR 2.611(A)(1)(c) and (d). However, if the only error is the excessiveness of the verdict, the trial court may deny a new trial if the nonmoving party consents to entry of judgment in an amount

² We note that as it relates to economic damages, even in the absence of defendant’s waiver of the issue, remand on the issue of economic damages would not be required since the jury found in favor of all three theories of recovery, any one of which would support the award of economic damages in its entirety. Moreover, because the same conduct gave rise to the noneconomic damages, regardless whether that conduct was labeled sex discrimination or sexual harassment, the entire damage award is supported despite our reversal of the sexual harassment claim.

that the trial court finds to be the highest amount supported by the evidence. MCR 2.611(E)(1). An appellate court may not disturb a trial court's ruling in this regard absent an abuse of discretion. *Palenkas, supra*, 432 Mich 533; *Craig, supra*, 249 Mich App 539. Although the trial court should consider a number of factors, such as whether a verdict was induced by bias or prejudice, the trial court's inquiry should be limited to objective considerations related to the actual conduct of the trial or the evidence presented. *Palenkas, supra*, at 532; *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 416; 516 NW2d 502 (1994).

The test for remittitur requires a court to examine whether the evidence submitted will support the jury award. *Deihm, supra*, 213 Mich App 404. In cases of remittitur, a court may lower the jury's determination of damages as a matter of law only after determining that the award is unsupported by the evidence introduced at trial. See *Szymanski, supra*, 221 Mich App 431. Although some opinions make fleeting reference to comparable jury awards, the core analysis must focus on the evidence in the case at bar. *Knight v Gulf & Western Properties, Inc*, 196 Mich App 119, 131-132; 492 NW2d 761 (1992).

Here, the trial court found as follows regarding past and future lost wages, bonuses, and fringe benefits:

[T]he court again finds no sound basis to challenge or overturn the \$438,000.00 jury award for past and future lost wages, bonuses, and fringe benefits.

However, the trial court did reduce the jury's award of \$1,000,000 for past noneconomic damages and \$500,000 for future noneconomic damages to a total of \$600,000 for past and future noneconomic damages. The trial court believed the noneconomic damages awarded by the jury were "grossly excessive and tainted by a desire to punish defendant." Thus the trial court stated:

After careful consideration, the Court finds that the evidence presented would support a total award for past and future non-economic damages in the amount of \$600,000. The Court, in arriving at this figure, has given considerable deference to the jury award for past emotional distress damages, particularly given plaintiff's year long search for employment, the problems with her children, and the egregious actions of defendant which undoubtedly caused significant stress, anger, humiliation, etc. Considerably less deference was given to the award of future emotional distress damages. Finally, while this was not the dominate [sic] consideration, the Court, in arriving at this figure, did attempt to reach some reasonable balance between economic damages and non-economic damages.

Defendants argue that the trial court should have vacated plaintiff's award for future lost wages because plaintiff was not constructively discharged because she presented no evidence that reinstatement was impracticable, and she was an at-will employee who could have been discharged at any time for any reason.

"[A] constructive discharge occurs only where an employer or its agent's conduct is so severe that a reasonable person in the employee's place would feel compelled to resign." *Jacobson v Parda Fed Credit Union*, 457 Mich 318, 325-326; 577 NW2d 881 (1998), quoting *Champion v Nationwide Security, Inc*, 450 Mich 702, 710; 545 NW2d 596 (1996). A "[p]laintiff

must first establish the requisite statutory . . . harassment before a claim of additional aggravating circumstances is considered.” *Radtke, supra*, 442 Mich 373 n 1. In other words, a finding of harassment is a “necessary predicate” to plaintiff’s claim of constructive discharge. *Id.*

Because plaintiff has established the requisite statutory harassment, the issue is whether defendants’ conduct would not be perceived by a reasonable person as so intolerable that an employee would feel compelled to resign. See *Jacobson, supra*, 457 Mich 326. We find that the harassing incidents occurred on a regular basis and some were extremely severe. In fact Markey assaulted plaintiff, called her “bitch” repeatedly, made constant complaints about women in management, and also drew a picture of his penis and showed it to plaintiff. Plaintiff attempted to work through the issues using the proper channels, and directly reporting his conduct to her superiors. Plaintiff attempted to use available remedies, but instead was maltreated and investigated for her conduct, and ultimately defendants took no remedial action to stop the harassment.

After plaintiff herself was investigated, instead of agreeing to a six-month severance package offered by defendants, plaintiff initially agreed to accept a demotion and a reassignment to the Farmington Hills station over one hundred miles from her home in order to keep her employment. After she agreed to the initial demotion and transfer, defendants then again moved the station that she was going to be assigned to Romulus, which was located over 137 miles from her home. At this point plaintiff faxed a letter to defendants stating that she could not report to the Romulus office because of the distance. In response she was terminated. Our review of the record reveals that plaintiff has shown that under the circumstances of this case, a reasonable person would have found defendants’ conduct so intolerable that she would have resigned. *Jacobson, supra*, 457 Mich 326.

Defendants’ argument regarding at-will employment is applicable to breach of employment contract claims and is not relevant to the discrimination claim at bar. Thus, in light of our resolution of the constructive discharge issue, and because defendants’ argument regarding at-will employment is not pertinent, we find that the trial court did not abuse its discretion when it upheld the jury award for future lost wages.

Defendants next argue that the trial court should have further reduced plaintiff’s award for mental anguish because she did not present evidence of “special humiliation” and did not establish a causal nexus between defendants’ alleged wrongful acts and her mental anguish. Plaintiff argues on cross-appeal that the trial court erred when it substituted its own judgment for the sound judgment of the jury and abused its discretion when it granted remittitur.

“It is well established that victims of discrimination may recover for psychic injuries such as humiliation, embarrassment, outrage, disappointment, and other forms of mental anguish that flow from discrimination.” *Hyde v University of Michigan Regents*, 226 Mich App 511, 522; 575 NW2d 36 (1997). In *Howard v Canteen Corp*, 192 Mich App 427, 435-436; 481 NW2d 718(1991), overruled on other grounds by *Rafferty v Markovitz*, 461 Mich 265; 602 NW2d 367 (1999), the Court stated that:

Victims of discrimination may recover for the humiliation, embarrassment, disappointment, and other forms of mental anguish resulting from the discrimination, and medical testimony substantiating the claim is not required.

When a verdict is within the range of the evidence produced at trial, it should not be reversed as excessive. With regard to remittitur, the only consideration expressly authorized by the remittitur court rule, MCR 2.611(E)(1), is whether the award is supported by the evidence. [Internal footnotes and citations omitted.]

Thus, defendants' argument fails because plaintiff need only present evidence that her psychic injuries flowed from the discrimination. *Hyde, supra*, 226 Mich App 522. Plaintiff presented evidence that after she was terminated by defendants she felt that she had lost her career, her home, and that the situation caused her to have to give up her children to live with their father in Massachusetts. She also could not find suitable employment quickly and suffered the stress of over a year-long job search. Plaintiff felt that her life was a "wreck" and she suffered emotional pain that has never gone away. We find that plaintiff presented evidence that her psychic injuries flowed from the discrimination. *Id.*

However, the trial court must also examine whether the evidence submitted at trial will support the jury award. *Deihm, supra*, 213 Mich App 404. The trial court should consider a number of factors, such as whether a verdict was induced by bias or prejudice, and the trial court's inquiry should be limited to objective considerations related to the actual conduct of the trial or the evidence presented. *Palenkas, supra*, 432 Mich 532; *Phillips, supra*, 204 Mich App 416.

We find that even viewing the evidence presented at trial in the light most favorable to the plaintiff when reviewing the trial court's exercise of discretion regarding the remittitur, the trial court did not abuse its discretion when it lowered the noneconomic damage award to \$600,000. *Deihm, supra*, 213 Mich App 405. We recognize that the trial court, having witnessed the testimony and the evidence as well as the jury's reactions, was in the best position to evaluate the credibility of the witnesses and make an informed decision, and thus afford the trial court's decision due deference. *Palenkas, supra*, 432 Mich 534; *Deihm, supra* at 404.

After reviewing the record together with the trial court's lengthy and fact-laden opinion on this issue, we find that the trial court correctly considered several factors when making its decision including whether the verdict was induced by bias or prejudice, and moreover, limited its inquiry to objective considerations related to the actual conduct of the trial or the evidence presented. *Palenkas, supra*, 432 Mich 532; *Phillips, supra*, 204 Mich App 416.

Lastly, defendants argue that plaintiff cannot recover for lost insurance benefits because plaintiff did not present any evidence that she purchased her own insurance or that she incurred out-of-pocket expenses that would have been incurred under defendants' insurance. Defendants did not raise this issue before the trial court in their motion for JNOV or for new trial or for remittitur, thus this issue is not preserved for our review and we decline to review it. *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 234; 504 NW2d 422 (1993).

V. Motion for Costs

This Court reviews an award of costs for an abuse of discretion. *Kernan v Homestead Dev Co*, 252 Mich App 689, 691; 653 NW2d 634 (2002). In civil cases, an abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and

logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Dep't of Transp v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000).

MCL 37.2802 provides that "[a] court, in rendering a judgment in an action brought pursuant to this article, may award all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, to the complainant in the action if the court determines that the award is appropriate." Defendants argue that the trial court erred when it ordered plaintiff be reimbursed for all of her litigation expenses, and not just those costs provided by statute and stated that recoverable costs are provided by statute and are set forth in MCL 600.2401 *et seq.*

Contrary to defendants' argument, "Elliott-Larsen does not differentiate between taxable costs and out-of-pocket expenses." *Lilley v BTM Corp*, 759 F Supp 1248, 1249 (ED Mich, 1991), reversed in part on other grounds, 958 F 2d 746 (CA 6, 1992). Furthermore, we have found no case law limiting the discretionary costs provided by MCL 37.2802 to "taxable costs" or "recoverable costs" as implicated by defendants. Thus, defendants' argument fails, and the trial court did not abuse its discretion when it awarded costs in the amount of \$8,100. *Kernan, supra*, 252 Mich App 691.

Affirmed in part, reversed in part.

/s/ William C. Whitbeck
/s/ Helene N. White
/s/ Pat M. Donofrio

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Court of Appeals of Michigan.

Nancy ROPP, Margy Kutzera and Deborah
Morgan, Plaintiffs-Appellees,
v.
WURTSMITH COMMUNITY FEDERAL
CREDIT UNION, Defendant-Appellant.

No. 156443.

April 19, 1996.

Before: MURPHY, P.J., and CORRIGAN and P.D.
HOUK, [FN*] JJ.

FN* Circuit judge, sitting on the Court of
Appeals by assignment.

[UNPUBLISHED]

PER CURIAM.

*1 In this employment discrimination case, defendant appeals as of right from a judgment entered in favor of plaintiffs following a jury trial. We affirm in part and reverse in part.

I

Defendant is a credit union with branches in Oscoda, Tawas City, Grayling, Mio and Au Gres, Michigan. Plaintiffs are all former employees of defendant. Plaintiffs Nancy Ropp and Margy Kutzera began working for defendant in 1966 and 1975, respectively. Plaintiff Deborah Morgan began working for defendant in 1986, after defendant merged with Morgan's former employer, Northeastern Community Credit Union. The events which serve as the predicate for this action allegedly occurred after defendant hired Terry Bigda as its new president in 1985.

Plaintiff Ropp was the assistant manager for the Oscoda branch when Bigda arrived in 1985. After Bigda's arrival, Ropp was reassigned to the position of Financial Operations Officer, and then later demoted to a position of "loan specialist," which entailed a cut in pay. Ropp was also transferred to the Tawas office and then later transferred back to the Oscoda office. In addition to these position changes, Ropp claimed that she was subjected to an ongoing course of unfair and unwarranted treatment by Bigda, including unreasonable work assignments, excessive workloads and unreasonable deadlines, and a continuing course of unfounded criticism, insults, threats, and other hostile comments. Ropp was terminated from her employment approximately one month before becoming eligible for early retirement.

Plaintiff Kutzera held the position of "head teller" when Bigda arrived. According to Kutzera, Bigda told her that she was going to head the loan department, but then ultimately gave that position to a male, David Corkery. Kutzera later received a series of reprimands from Bigda, which she claimed were unfounded. She was ultimately demoted and transferred from the Oscoda office to the Mio office, which was a significant distance from her home. Kutzera was subsequently offered a chance to return to the Oscoda office, but only in exchange for a waiver of her legal rights, which she refused to do. Kutzera was later allowed to transfer to a lower position at the Au Gres office and from there was transferred to the Tawas office, during which time she allegedly continued to be subjected to a course of unfair and unwarranted treatment. Kutzera eventually obtained another job, believing that she was being "railroaded" out of her employment with defendant.

After plaintiff Morgan began working for defendant in 1986, she progressed from the position of loan teller to loan officer and then to a "leader" position at the Tawas branch. Morgan claimed that she was interested in the Tawas branch manager position, but defendant hired a male for this position, Roger McMurray, without the position being posted. Morgan felt that she was not considered for the position because she was a woman. When McMurray quit after only three months on the job, the branch manager position was posted and Morgan applied. Morgan claimed that she was interviewed by Bigda and Robert Revenaugh, but was asked very little about her

qualifications and experience. She did not receive the position. Morgan claimed that she subsequently contacted Revenaugh to let him know she was upset about not getting the position and informed him that it was her intent to respond in writing. Shortly thereafter, Morgan received a written reprimand from Revenaugh wherein Revenaugh accused Morgan of having falsified her time card, which he likened to "theft."

*2 Plaintiffs Ropp, Kutzera, and Morgan subsequently instituted this action against defendant, alleging sex discrimination under the Civil Rights Act, M.C.L. § 37.2202(1)(a) *et seq.*; MSA 3.548(202)(1)(a) *et seq.*, and intentional infliction of emotional distress. Plaintiffs' claims were predicated on the unfavorable employment decisions described above, as well as the existence of an ongoing course of allegedly unfair and unwarranted treatment which, according to plaintiffs, was linked to their status as females. Defendant denied any discriminatory intent and further claimed that legitimate non-discriminatory reasons existed for the various employment decisions that were made.

The jury found in favor of plaintiffs, awarding \$700,000 to plaintiff Ropp, \$245,000 to plaintiff Kutzera, and \$65,000 to plaintiff Morgan. The judgment that was subsequently entered included prejudgment interest, costs, and attorney fees. Defendant's motions for directed verdict, judgment notwithstanding the verdict, new trial and remittitur were all denied by the trial court, as was a pretrial motion for summary disposition.

II

We begin by addressing defendant's claim that the trial court erred in denying its motions for directed verdict or judgment notwithstanding the verdict with respect to the sex discrimination claims. Defendant argues that the evidence was insufficient to establish a prima facie case of sex discrimination. Alternatively, defendant contends that, even if a prima facie case of sex discrimination was established, it provided legitimate, nondiscriminatory reasons for its employment decisions and plaintiffs failed to produce sufficient evidence to show that those reasons were a mere pretext for discriminatory conduct. We disagree. In reviewing a trial court's failure to grant a motion for directed verdict or judgment notwithstanding the

verdict, this Court must examine the testimony and all legitimate inferences that may be drawn therefrom in the light most favorable to the plaintiff. *Matras v. Amoco Oil Co*, 424 Mich. 675, 681-682; 385 NW2d 586 (1986). If reasonable jurors could honestly reach different conclusions, neither the trial court nor this Court has the authority to substitute its judgment for that of the jury. *Id.*

To establish a prima facie case of sex discrimination, a plaintiff must show membership in a class protected under the Civil Rights Act, M.C.L. § 37.2202(1)(a) *et seq.*; MSA 3.548(202)(1)(a) *et seq.*, and that, for the same or similar conduct, the plaintiff was treated differently than a member of the opposite sex. *Howard v. Canteen Corp*, 192 Mich.App 427, 431-432; 481 NW2d 718 (1992). If the defendant employer asserts legitimate, nondiscriminatory reasons for its actions, the plaintiff must then show that the reasons asserted were a mere pretext for discrimination. *Id.*

In the instant case, plaintiffs carried their burden of establishing a prima facie case of sex discrimination. The plaintiffs, because they were women, were members of a protected class under the Civil Rights Act. Plaintiffs introduced evidence that Bigda did not work well with women in positions of authority; that female employees tended to receive a disproportionate share of work in comparison to similarly situated male employees; that male employees who requested additional training or help often received it, whereas similar requests from female employees were ignored or denied; and that female employees were treated more harshly, and disciplined more frequently, than male employees for similar conduct. Plaintiffs also presented evidence that defendant's hiring patterns, particularly for supervisory positions, tended to favor males. Additionally, there was evidence that Bigda complained to several women that they were overpaid, that Bigda sometimes either created a new position or downgraded an existing position in lieu of promoting a woman, allegedly to avoid paying a woman a higher rate, and that male employees were more often paid outside the pay matrix. Plaintiffs also introduced a memorandum from defendant's supervisory committee to the board of directors. The memorandum expressed concern over the appearance of discrimination stemming from recent administrative changes, the treatment of Kutzera and Ropp, the advancement of a male employee, and recent hiring patterns. Although contradictory

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evidence was presented by defendant with respect to some of these matters, the trial court was required to consider the evidence in the light most favorable to plaintiffs. When viewed in such a light, the evidence was sufficient to enable a reasonable jury to conclude that plaintiffs were treated differently on account of their sex.

*3 Defendant argues that a prima facie case of discrimination was not established by plaintiff Morgan because Morgan never formally applied for the Tawas branch manager position when the position first became available. However, Morgan's claim of discrimination was not predicated solely on defendant's failure to offer her the Tawas branch manager position. In any event, Morgan's failure to formally apply for the position did not preclude a claim for discrimination. The requirement of a formal application has been excused in instances where an employer has used an informal, secretive selection process. *EEOC v. Metal Service Co.*, 892 F.2d 341, 350 (CA 8, 1990). See also *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1133 (CA 11, 1984) (where employer failed to use formal process for posting vacancies and for determining who would be considered for the job, and instead relied on word-of-mouth and informal review procedures, employer had the duty to consider all employees who might reasonably be interested). In this case, Morgan testified that the Tawas branch manager position was never posted before defendant hired Roger McMurray for the position. Morgan claimed that, before McMurray was hired, someone had been serving as the acting branch manager. Morgan had "no idea" what defendant planned to do with the position or whether defendant intended on hiring someone new as the permanent branch manager. Morgan, who held the position immediately below that of branch manager, testified that she never applied for the position because it was never posted, but would have applied had the position been posted. Under these circumstances, we find that Morgan's failure to formally apply for the position when it first became available was not fatal to her claim.

We also find that plaintiffs presented sufficient evidence to show that defendant's proffered reasons for its employment decisions were a pretext for discrimination. A plaintiff may succeed in establishing that the defendant's proffered reason was a pretext either directly by persuading the trier of fact that a discriminatory reason more likely

motivated the employer, or indirectly, by showing that the proffered reason is not worthy of credence. *Pomrancy v. Zack Co.*, 159 Mich.App 338, 343; 405 NW2d 881 (1987). Defendant correctly observes that plaintiffs may not question the soundness of its business judgment as a means of showing pretext. *Dubey v. Stroh Brewery Co.*, 185 Mich.App 561, 566; 462 NW2d 758 (1990). However, plaintiffs introduced evidence suggesting that business judgment had nothing to do with the employment decisions in question. A former member of defendant's supervisory committee testified at trial that he once questioned Bigda about his treatment of plaintiff Kutzera, which the committee member felt was unjustified, whereupon Bigda told him, "I'm getting rid of three of them and I'm starting with the toughest one first." The committee member understood Bigda to be referring to Kutzera, Ropp, and another woman. When the committee member subsequently cautioned Bigda about the possibility of his conduct leading to legal action, Bigda responded, "You win some, you lose some."

*4 Although defendant claimed that Morgan lacked the requisite experience to be a branch manager, the record indicates that the person who was ultimately hired for the branch manager position, Roger McMurray, had no prior credit union experience, whereas Morgan held an associates' degree in banking studies and management and had worked in the banking industry since 1973. Moreover, Morgan testified that when she was interviewed for the branch manager position after McMurray quit, she was asked very little about her qualifications and experience. Defendant also claimed that Morgan was not qualified because she was not from the Tawas area. However, plaintiff presented the testimony of Ronald Fiebelkorn, who stated that he was offered the Tawas branch manager position, although he was not from the Tawas area.

This and other evidence, viewed most favorably to plaintiffs, was sufficient to enable the jury to conclude that defendant's proffered reasons for its employment decisions were a pretext for discrimination.

Accordingly, the trial court did not err in denying defendant's motions for directed verdict or judgment notwithstanding the verdict with respect to plaintiffs' claims for sex discrimination.

Defendant also argues that the trial court erred in

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denying its pretrial motion for summary disposition of the sex discrimination claims. We disagree. Defendant's motion was brought under MCR 2.116(C)(10). Such a motion tests the factual sufficiency of a claim. *Featherly v. Teledyne Industries, Inc.*, 194 Mich.App 352, 357; 486 NW2d 361 (1992). The trial court must give the benefit of any reasonable doubt to the nonmoving party and determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Id.* Consistent with our prior discussion, we are satisfied that the trial court properly determined that the submitted evidence established a genuine issue for trial. Therefore, defendant's motion for summary disposition was properly denied.

III

Next, defendant argues that the trial court erred in denying its motions for summary disposition, directed verdict, or judgment notwithstanding the verdict with respect to the claims of intentional infliction of emotional distress brought by plaintiffs Kutzera and Morgan. [FNI] The elements of this tort are: (1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress. *Linebaugh v. Sheraton Michigan Corp.*, 198 Mich.App 335, 342; 497 NW2d 585 (1993). Defendant maintains that the evidence was insufficient to prove the first element, namely, that the conduct complained of was extreme and outrageous. In *Linebaugh*, this Court observed:

FN1. Defendant was granted summary disposition with respect to a claim for intentional infliction of emotional distress brought by plaintiff Ropp.

Liability for the intentional infliction of emotional distress has been found only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.... Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.

*5 Although it is questionable whether the conduct complained of with respect to plaintiffs Kutzera and

Morgan could be viewed as being sufficiently extreme and outrageous to render defendant liable for intentional infliction of emotional distress, we find that reversal is not warranted.

It is well established that emotional distress damages are recoverable under the Civil Rights Act "to compensate a claimant for 'humiliation, embarrassment, and outrage' resulting from discrimination prohibited by the act." *Department of Civil Rights v Silver Dollar Cafe (On Remand)*, 198 Mich.App 547, 549; 499 NW2d 409 (1993), quoting from *Eide v. Kelsey-Hayes Co.*, 431 Mich. 26, 36; 427 NW2d 488 (1988). See also *Brunson v. E & L Transport Co.*, 177 Mich.App 95, 106; 441 NW2d 48 (1989) (a victim of discrimination may recover for the humiliation, embarrassment, disappointment and other forms of mental anguish which result from discrimination). Thus, plaintiffs Kutzera and Morgan were entitled to recover emotional distress damages independent of any claim they may have had for intentional infliction of emotional distress.

Moreover, the record indicates that a special jury verdict form was used for each plaintiff. The jury verdict form for plaintiff Kutzera provided, and was completed, as follows:

1. Did the defendant discriminate against Margy Kutzera on the basis of her sex? Yes ☒ No ☐
 2. If so, did defendant's discrimination cause damages to Margy Kutzera? Yes ☒ No ☐
 3. If so, did the defendant's discrimination cause:
 - a) emotional damages to Margy Kutzera? Yes ☒ No ☐
 - b) economic damages to Margy Kutzera? Yes ☒ No ☐
 4. Did the defendant's conduct amount to intentional infliction of emotional distress upon Margy Kutzera? Yes ☒ No ☐
 5. If so, did the intentional infliction of emotional distress cause severe emotional distress to Margy Kutzera? Yes ☒ No ☐
 6. If so, did the intentional infliction of emotional distress cause:
 - a) emotional damages to Margy Kutzera? Yes ☒ No ☐
 - b) economic damages to Margy Kutzera? Yes ☒ No ☐
- If you have answered "YES" to Questions 2 or 5 or both, answer the following questions on damages.
- If you have answered "NO" to both Questions 2

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and 5, answer no further questions.

7. a) What is the amount of Margy Kutzera's emotional damages to the present time? 30,000.

b) What is the amount of Margy Kutzera's economic damages to the present time? 100,000.

A similar verdict form was completed in a similar fashion for plaintiff Morgan. Defendant approved the verdict forms and did not request separate damage awards for the two different theories of liability.

As noted above, the law provides for the recovery of emotional distress damages by plaintiffs who experience discrimination. The jury in this case expressly found that plaintiffs Kutzera and Morgan both sustained emotional distress damages on account of discrimination. There is no indication in the record that either Kutzera or Morgan sought to recover damages for intentional infliction of emotional distress on the basis of conduct that was not also alleged to be discriminatory. Indeed, defendant's approval of the verdict forms and failure to request separate damage awards for the two different theories of liability, reflect defendant's acknowledgment that any award of emotional distress damages could be predicated upon a finding of liability for either discrimination or intentional infliction of emotional distress. Under these circumstances, and because the jury expressly found that Kutzera and Morgan both sustained emotional distress damages on account of discrimination, we find that any error in submitting the intentional infliction of emotional distress claims to the jury was harmless.

IV

*6 Defendant argues that the trial court erred in denying its motions for new trial, judgment notwithstanding the verdict, or remittitur with respect to damages.

The jury awarded plaintiff Ropp \$150,000 for past economic damages, \$460,000 for past emotional damages, and \$90,000 for future emotional damages. Plaintiff Kutzera was awarded \$100,000 for past economic damages, \$115,000 for future economic damages, and \$30,000 for past emotional damages. Plaintiff Morgan was awarded \$50,000 for past economic damages and \$15,000 for past emotional damages.

In determining whether remittitur is appropriate,

the proper consideration is whether the jury award was supported by the evidence. *Clemens v. Lesnek*, 200 Mich.App 456, 464; 505 NW2d 283 (1993); MCR 2.611(E)(1). This determination must be based on objective criteria relating to the actual conduct of the trial or the evidence presented. *Palenkas v. Beaumont Hospital*, 432 Mich. 527, 532; 443 NW2d 354 (1989). If the award falls reasonably within the range of the evidence and within the limits of what reasonable minds would deem just compensation, the jury award should not be disturbed. *Howard, supra* at 435-436; *Frohnman v. Detroit*, 181 Mich.App 400, 415; 450 NW2d 59 (1989). However, if an award is not supported by the evidence at trial, it should be reversed as excessive. *Howard, supra*; *Brunson, supra*. When reviewing the trial court's decision, this Court must afford due deference to the trial court's ability to evaluate the jury's reaction to the evidence, and only disturb the trial court's decision if there has been an abuse of discretion. *Palenkas, supra*; *McLemore v. Detroit Receiving Hospital*, 196 Mich.App 391, 401; 493 NW2d 441 (1992).

Defendant attacks the various verdicts for economic damages, claiming that the evidence failed to support an award of damages for lost retirement benefits and failed to support wage loss projections based on a five percent yearly raise. We find that each of these matters were supported by the evidence. The record indicates that several documents describing defendant's retirement plan, including how benefits are calculated, were received into evidence and counsel's arguments were based on those documents. Contrary to what defendant argues, this Court's decision in *Wilson v. General Motors Corp*, 183 Mich.App 21, 39; 454 NW2d 405 (1990), does not hold that "such a presentation" is insufficient to support an award of damages for retirement benefits. To the contrary, this Court in *Wilson* upheld an award of damages for retirement benefits, finding that "[t]he value of plaintiff's retirement benefits and stock benefits could be calculated by reference to the brochure and plaintiff's former wages." *Id.* A review of the record also discloses that both testimonial and documentary evidence was presented indicating that plaintiffs would have been eligible for yearly raises of up to five percent per year. Therefore, a jury calculation on this basis would not have been speculative. *Goins v. Ford Motor Co*, 131 Mich.App 185, 199; 347 NW2d 184 (1983).

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*7 Defendant also challenges the amount of the verdicts for economic damages, claiming they are excessive. Evidence was presented indicating that plaintiff Ropp sustained past lost wages and retirement benefits in excess of \$150,000. Therefore, the jury's verdict of \$150,000 is not so excessive as to be unsupportable. Moreover, we reject defendant's claim that Ropp improperly received wage loss damages for lost wages that she collected under the Workers' Disability Compensation Act. The record indicates that, after the jury's verdict was rendered, an order was entered reducing the verdict by "the amount of workers' compensation [benefits] ... actually received which were duplicative of past lost wages awarded."

The verdict of \$115,000 for future economic damages for plaintiff Kutzero likewise is supported by evidence of future wage and pension loss projections and, therefore, is not excessive. Indeed, defendant's primary objection to this award is that "[i]t is more reasonable to assume that plaintiff will eventually make the same or more than she would have [with defendant] if diligent efforts to mitigate [are] taken." However, this was a factual matter for the jury to resolve. Moreover, the burden of proof with respect to the issue of mitigation was on defendant. *Rasheed v. Chrysler Corp.*, 445 Mich. 109, 130-132; 517 NW2d 19 (1994).

We find, however, that the evidence does not support the verdicts for past economic damages with respect to plaintiffs Kutzero and Morgan. The wage and pension loss projections that were presented and requested by plaintiffs' counsel at trial indicated that Kutzero and Morgan sustained past economic damages of \$51,768 and \$25,095, respectively. Thus, the amounts awarded by the jury, \$100,000 and \$50,000, respectively, are not supported. Therefore, defendant is entitled to remittitur for these items. Accordingly, the verdict of \$100,000 for past economic damages for plaintiff Kutzero is remitted from \$100,000 to \$51,768, and the verdict of \$50,000 for plaintiff Morgan is remitted to \$25,095. *Wilson, supra*.

Defendant also argues that the verdicts for emotional damages were excessive. We disagree. As noted previously, victims of discrimination may recover emotional damages for the humiliation, embarrassment, disappointment, outrage and other forms of mental anguish which result from the

discrimination. *Silver Dollar Cafe (On Remand)*, *supra*; *Brunson, supra*.

Plaintiff Ropp testified that she went on medical leave on March 11, 1988, for a variety of problems, several of which were related to events at work. Ropp testified that she had difficulty sleeping and would have "horrendous nightmares" wherein she would encounter Terry Bigda "in all sorts of places." Ropp also had trouble eating because she would get "knots" in her stomach that were "so big, food wouldn't fit." She further testified that the humiliation, put-downs and demeaning treatment that she received at work had "totally taken away" her self-confidence and self-worth and, despite her years of accomplishment at the credit union, she felt like a "complete failure." Other witnesses also testified that there were noticeable changes in Ropp's emotional state over the course of her employment during the relevant period in question. According to one witness, Grace Charters, Ropp was not able to talk about her job without crying. Ropp sought treatment with a clinical psychologist and a psychiatrist to help her deal with her emotional problems. Ropp testified that, at the time of trial, she was still experiencing nightmares, her self-esteem and self-confidence was still low, and she was still treating with a psychologist and psychiatrist.

*8 A psychiatrist who examined Ropp, Dr. Feldstein, testified that he formed two diagnostic impressions, one being a major depressive episode which he believed was related to Ropp's experiences at work, and the other being the presence of compulsive personality traits which were of a longstanding nature, but which became intensified and ineffective as a result of the events at work. Feldstein opined that Ropp's adaptive methods for dealing with her compulsive personality traits were "gradually undermined and destroyed" by the events at work, such that Ropp was "no longer able to function adequately," thereby leaving her "increasingly more despondent and more anxious" and with a "sense of helplessness and hopelessness." It was Dr. Feldstein's opinion that Ropp was unable to return to work at the time due to the "impairment in self-worth and self-esteem," her "accompanying depression," and "difficulty in trust relationships with supervisors because of the manner in which she had been treated." Dr. Feldstein characterized Ropp's prognosis as "guarded."

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Viewed in a light most favorable to Ropp, we conclude that the evidence supported the verdicts of \$460,000 for past emotional damages and \$90,000 for future emotional damages. Therefore, the trial court did not abuse its discretion in denying defendant's motion for remittitur with respect to plaintiff Ropp.

Likewise, we conclude that the trial court did not abuse its discretion in denying defendant's motions for remittitur with respect to the verdicts for past emotional damages for plaintiffs Kutzera and Morgan. Kutzera and Morgan both testified regarding the effects of the allegedly discriminatory treatment. Other witnesses also testified that they noticed changes in Kutzera's and Morgan's emotional states during the relevant periods in question. Although defendant complains that the damage awards were not supported by expert testimony, supporting medical testimony was not required. *Howard, supra* at 435. Viewed in a light most favorable to Kutzera and Morgan, the evidence supported the respective verdicts of \$30,000 [FN2] and \$15,000 for past emotional damages.

FN2. Defendant incorrectly asserts in its brief that Kutzera was awarded \$100,000 for past emotional damages. The jury verdict form clearly indicates that Kutzera was awarded only \$30,000 for this item.

V

Defendant next argues that the trial court erred in its award of attorney fees. The trial court awarded plaintiffs attorney fees under § 802 of the Civil Rights Act, M.C.L. § 37.2802; MSA 3.548(802). The trial court also awarded plaintiffs Kutzera and Ropp attorney fees under the mediation court rule, MCR 2.403(O)(1), and awarded plaintiff Morgan attorney fees under the offer of judgment court rule, MCR 2.405(D)(2). The record indicates that defendant stipulated to the amount of plaintiffs' attorney fees, but reserved the right to contest plaintiffs' entitlement to an award of attorney fees in the first instance.

Defendant first argues that an award of attorney fees under the Civil Rights Act was improper. We disagree. MCL 37.2802; MSA 3.548(802) gives a

trial court authority to award attorney fees in a civil rights case. The decision to grant or deny an award of attorney fees under this section is discretionary with the trial court. *Howard, supra* at 437; *King v. General Motors Corp*, 136 Mich.App 301, 307; 356 NW2d 626 (1984). Here, in deciding whether to grant an award of attorney fees, the trial court considered the circumstances and nature of the case, including the existence of a contingency fee agreement, in light of the purposes of the civil rights act. See *King, supra* at 307- 308; *Wilson, supra* at 42. We find that the trial court properly exercised and did not abuse its discretion in awarding attorney fees.

*9 Defendant next argues that it was improper to award attorney fees under both the Civil Rights Act and the mediation or offer of judgment court rules. However, because each of these provisions serve an independent policy or purpose, the award of attorney fees under both was appropriate. *Howard, supra* at 441.

Finally, defendant argues that it was improper to award statutory prejudgment interest, M.C.L. § 600.6013; MSA 27A.6013, on the portion of attorney fees awarded under the Civil Rights Act. We disagree. Defendant relies on a series of cases which hold that statutory interest may not be granted on an award of attorney fees. See e.g., *Giannetti Brothers Const Co v. City of Pontiac*, 175 Mich.App 442, 448-449; 438 NW2d 313 (1989); *Harvey v. Gerber*, 153 Mich.App 528, 530; 396 NW2d 470 (1986); *City of Warren v. Dannis*, 136 Mich.App 651, 662-663; 357 NW2d 731 (1984). However, none of those cases involved an award of attorney fees under the Civil Rights Act. Here, the trial court observed that, while other statutes or court rules provide for an award of attorney fees as an element of costs, § 802 of the Civil Rights Act provides that attorney fees are recoverable as an element of damages.

Furthermore, apart from the unique treatment of an award of attorney fees under the Civil Rights Act, other cases have held that statutory interest may be granted on an award of attorney fees. See *Wayne-Oakland Bank v. Brown Valley Farms, Inc*, 170 Mich.App 16, 22-23; 428 NW2d 13 (1988). Cf. *Pinto v. Buckeye Union Ins Co*, 193 Mich.App 304, 312; 484 NW2d 9 (1992). Moreover, a recent amendment to M.C.L. § 600.6013; MSA 27A.6013 provides that statutory interest "shall be calculated

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on the entire amount of the money judgment, "including attorney fees and costs." MCL 600.6013(6); MSA 27A.6013(6), as amended by 1993 PA 78. Although the amendment is not controlling for purposes of this case, it serves as support for the conclusion that the pre-amendment cases allowing statutory interest on an award of attorney fees is the preferred line of authority.

We reject defendant's claim that a different result is compelled by this Court's decision in *City of Flint v. Patel*, 198 Mich.App 153, 161; 497 NW2d 542 (1993). *Patel* involved an action that was brought under the Uniform Condemnation Procedures Act. M.C.L. § 213.51 *et seq.*; MSA 8.265(1) *et seq.* The decision was predicated on a finding that the general interest statute, M.C.L. § 600.6013; MSA 27A.6013, was not applicable because the UCPA contained its own provision governing interest on money judgments. The Civil Rights Act, in contrast to the UCPA, does not contain its own interest provision. Therefore, defendant's reliance on *Patel* is misplaced.

Accordingly, we find that the trial court did not err in awarding statutory interest on the attorney fees awarded under the Civil Rights Act.

Affirmed in part and reversed in part. The verdict for past economic damages for plaintiff Kutzera is remitted from \$100,000 to \$51,768, and the verdict for past economic damages for plaintiff Morgan is remitted from \$50,000 to \$25,095.

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